



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001147

First-tier Tribunal No: DA/00043/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th February 2025

Before

UPPER TRIBUNAL JUDGE NEVILLE

Between

S H
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Decided without a hearing under rule 34

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. Nothing in this order shall prevent such information being passed to anyone involved in the appellant's medical or social care, or to the appellant's sister.

DECISION AND REASONS

1. The appellant is a national of Hungary. On 16 February 2022 the respondent made a decision under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 to deport the appellant, and on 28 June 2023 a further decision refusing his protection and human rights claims.

2. The appeal against those decisions was heard by First-tier Tribunal Judge Aziz on 5 January 2024. By that time the appellant was detained under the Mental Health Act 1983 and had no legal representative, and his grounds of appeal were drafted by his sister. The First-tier Tribunal arranged a CVP link to be made available to be accessed from hospital, and for the appellant's sister who had written to say that she was unwell.
3. The appeal was dismissed. Following an application for permission to appeal having been refused by a different First-tier Tribunal Judge, permission was granted on renewal by Upper Tribunal Hirst. Her observations included the following: (I have omitted text that might identify the appellant)
 10. [...] The Tribunal recorded that the Appellant had refused to leave his room to join the CVP hearing despite several attempts to persuade him to attend, and noted that the Appellant had not sought to "effectively or productively engage in these proceedings" since the grounds of appeal were lodged.
 11. The Respondent was represented by a Presenting Officer, who requested that the appeal hearing proceed in the Appellant's absence. The Tribunal acceded to that request, concluding that there would be little benefit in adjourning the appeal as it was unclear that the Appellant could in any event participate in the hearing due to his mental illness.
 12. The determination records that the Respondent's representative relied on both the Respondent's EEA deportation decision of 16 February 2022 and the refusal of the Appellant's human rights claim on 28 June 2023. Although the Appellant's grounds of appeal had been addressed to the EEA deportation decision, the Tribunal dealt with the appeal as arising under s82 Nationality Immigration and Asylum Act 2002 on protection and human rights grounds (Articles 3 and 8 ECHR) only.
 13. The judge concluded that the Appellant was excluded from Refugee Convention protection pursuant to s72 Nationality, Immigration and Asylum Act 2002 by virtue of his detention in hospital from 2017-2021, noting that the Appellant had not submitted any evidence to rebut the presumption under s72(5A) that he constituted a danger to the community. He also dismissed the Appellant's appeal under Articles 3 and 8 ECHR, again relying on the lack of evidence provided by the Appellant. The judge referred to the EEA Regulations only at paragraph 36 of the determination, which summarised the Respondent's position on the Appellant's family and private life claim under the Regulations.

[...]

 15. The brief grounds of appeal drafted by the Appellant's sister do not identify a specific error or errors of law in the determination of the First Tier Tribunal. The grounds do however ask the Upper Tribunal to reconsider the First Tier decision on the basis that the

Appellant is and was not capable of accessing legal advice or representing himself in court. The grounds state that the Appellant was not able to attend the appeal hearing on 5 January 2024 because his medication meant that he was asleep and could not be woken; his CPN had had to speak on his behalf because he was unwell.

16. I consider that it is strongly arguable that there was material unfairness in the First Tier Tribunal appeal hearing. The judge does not appear to have addressed himself to the correct question when considering whether to proceed in the absence of the Appellant, namely whether it was in the interests of justice for him to do so. The Appellant was a detained patient and was not legally represented, and his appeal had not previously been adjourned. There is no record that the Tribunal made any enquiry of the Appellant's CPN, who was present, as to whether the Appellant was likely to be able to participate in a future hearing, or what reasonable adjustments could be made to enable the Appellant's participation. There does not appear to have been any enquiry as to whether [his sister] had been notified of the hearing despite her request to attend via videolink. Nor, despite the Tribunal's conclusion that the Appellant was unable to participate in the hearing due to his mental illness, does any consideration appear to have been given to the appointment of a litigation friend. The central issue for the Tribunal was fairness, but it is not apparent from the determination that the judge considered fairness at all.
17. The lack of evidence from the Appellant was material to the Tribunal's conclusions as to s72 Nationality, Immigration and Asylum Act 2002 and also to the human rights aspects of the appeal.
18. It is also strongly arguable that the First Tier Tribunal erred by failing to address the Appellant's appeal against deportation under s36 of the EEA Regulations, which was clearly in issue before the Tribunal and which the judge was therefore required to consider and determine.
19. I therefore grant permission to appeal.

4. In directions sent to the parties on 14 October 2024, UTJ Hirst set out her preliminary view that, for the reasons given above:
 - a. Proceeding with the hearing was procedurally unfair;
 - b. The Judge failed to determine the EEA appeal before him; and
 - c. By reason of those errors of law, the decision should be set aside without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the case be remitted to the First-tier Tribunal for re-hearing on all issues.

5. The parties were directed to provide any objections to that course of action within 14 days thereafter. Nothing has been received from either party.
6. For the reasons given by UTJ Hirst, with which I concur, I am satisfied that:
 - a. It is appropriate to decide the appeal without a hearing, the error of law being clearly made out and no objection having been received from either party;
 - b. The First-tier Tribunal's decision involved the making of errors on points of law and must be set aside; and
 - c. The appellant has yet to have a fair hearing of his appeal, extensive and sensitive fact-finding will be required, and the appropriate disposal is therefore to remit the case to the First-tier Tribunal hearing with no findings of fact preserved.
7. Given that the appeal concerns a protection claim, and due to the appellant's mental health problems, derogation from the principle of open justice is justified and I make the anonymity order appearing above. I have separately directed that a copy of this decision be sent to the appellant's psychiatric nurse and to his sister.

Notice of Decision

- (i) The decision of the First-tier Tribunal involved the making of errors of law and is set aside.
- (ii) The case is remitted to the First-tier Tribunal for re-hearing with no facts preserved, to be heard by any judge other than Judge Aziz.
- (iii) The case be referred to the Resident Judge at Birmingham IAC for directions to be made for the fair hearing of the appeal.

J Neville
Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 February 2025